



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

February 8, 2018

Mr. Abraham Lustgarten
ProPublica
2600 10th Street, Suite 426
Berkeley, CA 94710

Re: Freedom of Information Act Appeal No. EPA-HQ-2018-003477 (Request No. EPA-HQ-2017-004815)

Dear Mr. Lustgarten:

This letter is in response to your January 17, 2018 Freedom of Information Act (FOIA) appeal of the final response and decision letter from Jeff Gaines, Environmental Scientist, Program Implementation and Information Division, Office of Resource Conservation and Recovery in the Office of Land and Emergency Management (OLEM). On January 16, 2018, OLEM responded to your March 10, 2017 FOIA request seeking "information regarding the practice of Open Burn and Open Detonation of explosives and energetics materials in the United States," as described more fully in your request. In its response, OLEM explained that "[i]nformation responsive to most of your questions can be found via online search tools that EPA maintains, and that provide publicly available information on hazardous waste facilities." OLEM also provided you with information responsive to your request for a list of EPA Headquarters staff who work directly on Open Burn and Open Detonation issues.

OLEM also explained that it did not conduct a search for the portion of your request seeking "copies of all correspondence having to do with OB/OD issues involving the Office of Solid and Hazardous Waste, Federal Facilities Enforcement, Resource and Conservation Recovery, CERCLA, and the office of the administrator since January 1, 2010." The response stated that OLEM had asked you to clarify this portion of the request but you did not respond. In your appeal, you challenge OLEM's failure to conduct a search for records responsive to this part of your request.

I have carefully considered EPA's decision and your appeal, and have determined that your appeal should be, and is, granted.

In your appeal, you claim that EPA declined to respond to your request for correspondence regarding the issue of open burn and open detonation and claim that the Agency did not inform you of the need for clarification. After discussing your request with OLEM, I have confirmed that OLEM asked you to clarify this portion of your request on two separate occasions: first, during a phone conversation on March 27, 2017, and again, via email on March 28, 2017. A copy of the email correspondence containing this request for clarification and documenting your phone conversation is attached to this determination.

Nevertheless, pursuant to 40 C.F.R. § 2.204(k), I am remanding your FOIA request back to OLEM to conduct a proper search for responsive records, and to provide you with the appropriate basis

for withholding, volume estimate of withholdings, and other requirements for a final response, consistent with 40 C.F.R. § 2.104(h), contingent upon receiving a timely clarification from you of this portion of your request. You will need to contact OLEM to clarify this portion of your request, which as written, is improper as it does not reasonably describe the records sought. EPA's regulations state:

“Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request.”
40 C.F.R. § 2.102(c).

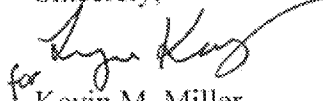
A reasonable description of the documents sought in a FOIA request must be “sufficient [to] enable [] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” Truitt v. Dep’t of State, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990) (quotation marks and citation omitted). Your request for records “having to do with” a certain topic for the past eight years does not reasonably describe the requested records. Courts have deemed FOIA requests overbroad and thus invalid where they seek “all records” related to a subject matter but not to a specific office or custodian. See, e.g., Dale v. I.R.S., 238 F. Supp. 2d 99, 104-105 (D.D.C. 2002); Vest v. Dep’t of Air Force, 793 F. Supp. 2d 103, 113–115 (D.D.C. 2011); Freedom Watch, Inc. v. Dep’t of State, 925 F. Supp. 2d 55, 61 (D.D.C. 2013).

To provide OLEM with the clarification necessary to complete its search, please contact Amanda Kohler at kohler.amanda@epa.gov or 703-347-8975 within **10 business days of this decision**. Failure to do so will result in the closure of your request.

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, (202) 741-5770 or 1-877-684-6448; and fax, (202) 741-5769.

Should you have any questions concerning this matter, please call Melissa Shapiro at (202) 564-2890.

Sincerely,

for

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: Amanda Kohler, ORCR
Valerie Ward, ORCR